SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPHINE HANNER,
Petitioner,

v.

CECIL DEMARCUS,
Respondent.

No. 497
RESPONDENT'S
ANSWERING
BRIEF

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SUMMARY OF ARGUMENT

The principal contentions of petitioner herein were neither timely raised nor passed upon by the Supreme Court of Arizona, and accordingly are not properly before this Honorable Court. These include (1) the alleged lack of compliance with the Arizona Statutes relative to execution, and (2) the argument that the only constitutionally permissible construction of Rule 53(a), Rules of Civil Procedure, A.R.S. 16, is that the remedy therein provided to the master is execution upon the person rather than upon his property.

Granting petitioner's assertion that actual notice of post-judgment execution upon property is required in Arizona per confrontation by the sheriff pursuant to A.R.S. 12-1562, there can be no constitutional requirement that prior notice be afforded by the provisions of Rule 53(a).

ARGUMENT

Petitioner's assertion that failure to comply with the Arizona law resulted in a deprivation of property without due process was neither timely raised nor passed upon in the Supreme Court of Arizona, and thus is not properly before this Honorable Court.

Petitioner contends, and respondent wholeheartedly agrees, that the execution statutes of the State of Arizona require actual notice to the judgment debtor of execution upon his property, and that such notice is embodied in confrontation with the sheriff and in the opportunity to designate the property to be executed upon. *Blasingame v. Wallace*, 32 Ariz. 582, 61 Pac. 42 (1927).

Petitioner argues that the decision of the Arizona Supreme Court herein is contrary to the "earlier and, we believe, wiser" case above cited. It is not. Perusal of the record reveals that the issue of noncompliance with the rule enunciated in *Blasingame, supra,* was not presented to the Supreme Court of Arizona until Petitioner's MOTION FOR REHEARING. (Compare APPELLANT'S OPENING BRIEF and APPELLANT'S REPLY

BRIEF filed herein with A. p. 34-37). Said motion was summarily denied by the Arizona Supreme Court. (A. p. 50).

It has been the unswerving policy of this Honorable Court not to accord review to questions initially raised upon motion for rehearing, unless the State Court entertains and passes upon the issues so presented; the motion for rehearing is no part of the record upon which the judgment is based. *Radio Station WOW v. Johnson,* 326 U.S. 120 (1944); *Godchaux Co. v. Estopinal,* 251 U.S. 179 (1919); *Simmerman v. Nebraska,* 116 U.S. 54 (1855).

The sole federal question passed upon by the Supreme Court of Arizona concerned the interpretation and constitutionality of Rule 53(a), Rules of Civil Procedure, A.R.S. 16, and the position of the Court relative to said statute is in every particular in accord with the demands of due process.

It was petitioner's contention as appellant before the Supreme Court of Arizona that Rule 53(a) was not "self-executing", i.e., that some further notice other than that of the judgment awarding master's fees was demanded by the statute before execution could occur. Petitioner urged that a contrary construction would result in a deprivation of property without due process. (APPELLANT'S OPENING BRIEF, issue No. 4, p. 14, issue No. 6, p. 15, Assignment of Error, No. VI, p. 21, Assignment of Error No. VII, p. 22, Assignment of Error, No. VIII, p. 22, Propositions of law No. IV, V and VI, pp. 27, 28). All other matters of constitutional import were either (a) raised for the first time on motion for rehearing (e.g., the argument per *Cutting v. Van Fleet,* 252 Fed. 100 (9th Cir. 1900) relative to execution upon the person, as well as the issue of noncompliance with the execution statutes previously discussed), or (b) have been abandoned by petitioner herein (e.g., the argument that Rule 53(a) is unconstitutionally vague).

The Supreme Court of Arizona ruled that no notice of intent to execute was required after proper notification of the judgment, and that Rule 53(a) was not lacking in the protections guaranteed by the requirements of due process (A. pp. 25, 26).

These rulings were made entirely within the context of Rule 53(a), and of course did not involve the construction or application of the execution statutes, since appellant had made no argument relative thereto nor even cited said statutes at that time.

The clear intent and result of Rule 53(a) is to place respondent in precisely the same position as any judgment creditor with the right to execute upon property. Petitioner concedes the constitutionality of the execution provisions re notice. Is it not fundamentally illogical to urge that notions of fair play require *prior additional* notice of intention to execute? Will this Honorable Court decide that *two* forms of actual notice be demanded hereafter, when none is now required? The inequities which are admittedly possible under the rationale of *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924), are not possible under the laws of Arizona *provided those laws are obeyed.* Whether there was fair compliance with the law in this case, and whether the Supreme Court of Arizona would have decided differently had the applicability of *Blasingame v. Wallace, supra*, been argued before it, are matters not properly at issue in this Honorable Court.

The meaning of the word "execution" as contained in Rule 53(a) is not properly reviewable herein.

As parenthetically noted heretofore, the Supreme Court of Arizona was never asked to consider the meaning of the word "execution" until the filing of petitioner's notice of rehearing. The matter was not considered at that time and cannot be entertained at this time. *Radio Station WOW v. Johnson, supra; Godchaux Co. v. Estopinal, supra; Simmerman v. Nebraska, supra.* Further, it seems self-evident that execution upon property is as constitutional as execution upon the person, provided that the demands of fair play are not lacking in either remedy.

Equitable considerations require affirmance of this case.

Counsel feels that the foregoing arguments are dispositive of the case at bar. Respondent shares petitioner's concern for fair-

ness, however, and urges strongly that his conduct in this matter was equitable in every regard.

Respondent earned a fair fee for a job well done. This is not disputed by petitioner. The record is utterly devoid of any tender whatever of this fee by petitioner, which tender is a condition precedent to demand for the equitable relief here sought. *Young Mines Co. v. Sevringhaus,* 38 Ariz. 160, 298 Pac. 628 (1931); *33 C.J.S. Executions,* §239 b., p. 500.

Petitioner was notified of the possibility of execution in the clearest possible language by the judgment and decree of divorce dated June 21, 1959 (A. p. 2). Yet, she failed to use the personal property allegedly available to file a supersedeas bond (A. p. 27).

Noting, once again that the Supreme Court of Arizona was not confronted with a single argument relative to the availability of personal property until motion for rehearing, its conclusion as to the reasonableness of execution upon the subject parcel is adequately reasoned and well within the bounds of its discretion (A. p. 27). Moreover, respondent is unable to agree that his report reveals personal property upon which execution might practicably have been obtained. The real estate contracts with a balance due of $12,693.24 (R. Report of Master, Schedule A-2), the furniture and fixtures worth $3,153.07 (R. Report of Master, Schedule A-3), and the automobiles worth $710.10 (R. Report of Master, Ex. A), are the only items mentioned, and surely offer little security for a fee in excess of $5,000.00. Neither can it be said that the price paid for the land was inadequate; the language of *Fox v. Jackson,* 116 Ind. App. 390, 64 N.E. 2d 799 (1946) seems appropriate:

> " . . . the test of adequacy of price is not what the property is worth, but what it will bring at a fair sheriff's sale, which is, of course, a forced sale. 33 C.J.S., Executions, §233, p. 493. No witness expressed an opinion as to what price the property would bring at a forced sale, but the court was entitled to believe that such a price might be substantially less than the fair market value."

Mr. DeMarcus was not acting as an officer of the court when he executed upon petitioner's land. He was enforcing his rights as a creditor. His report was a matter of public record. In the language of the Arizona Supreme Court, he executed upon property which he could reasonably assume to be "the only suitable separate property of Josephine Hanner upon which to execute." (A. p. 27).

CONCLUSION

The statutes of Arizona provided to petitioner every protection required by the Constitution of the United States. If the payment of her just debt did not exactly correspond to the amount owed, the explanation lies in her neglect to avail herself of the proper remedies, or from the failure of the sheriff to comply with the statutory requirement of actual notice. Of the first cause, she cannot complain. Of the second, she did not. Respondent prays that this Court not strike down the decision of the Arizona Supreme Court upon grounds neither presented to nor considered by that Tribunal, and respectfully asks that its judgment be affirmed.

Respectfully submitted,

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